Petition

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA,

Appellee

v.

JOHN D. LONG, III, Appellant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Office of Senate (State of South Carolina), District Number 5, Office Number 1, is an "enterprise" as defined by Title 18, United States Code, Section 1961(4)?

Title of this case in this Court is:

UNITED STATES OF AMERICA,
Appellee,
versus
JOHN D. LONG, III,
Appellant.

TABLE OF AUTHORITY

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Racketeers, Congress, and the Courts: An Analysis of RICO, Bradley, 65 IOWA L.REV. 837 (1980) 5

"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§1961-68: Broadest of the Federal Criminal Statutes, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978) 5

TITLE IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation, Note, 27 De Paul L. REV. 89, 5

(1977)

The Opinion of the Fourth Circuit Court of Appeals from which this Petition for a Writ of Certiorari is derived is contained in the Appendix. No official cite is now available.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was made and entered on June 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Title 18 U.S.C. §§1961(4), 1962(c) and (d) are involved in this petition for a writ of certiorari. Title 18 U.S.C. §1961(4) provides:

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

Title 18 U.S.C. §1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18 U.S.C. §1962(d) provides:

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

This is a criminal case involving the indictment of State Senator John D. Long, III, and his subsequent conviction. The indictment and conviction concerned Sections 1961(4) and 1962(c) and (d) of Title 18, U.S. Code (hereinafter RICO).

Specifically, the indictment's charge which was the subject of appeal in the court below is as follows:

> "The Office of Senate, District Number 5, Office Number 1,. . ., is an "enterprise" as defined by Title 18, United States Code, Section 1961, which enterprise was engaged in and the activities of which affected interstate commerce."

At each stage of the trial and the appeal to the United States Court of Appeals for the Fourth Circuit the issue of whether or not an enterprise includes the Senate of South Carolina has been presented.

Upon this narrow question rests the request for a Writ of Certiorari.

ARGUMENT

At issue before the Court is whether

the Office of Senate (State of South Carolina) District Number 5, Office Number 1, is an "enterprise" as defined by Title 18, United States Code, Section 1961(4). The granting of certiorari by this Court will allow it to resolve the following issue which is necessarily comprised therein:

> WHETHER A PUBLIC ENTITY AND SPECIFICALLY A STATE LEGISLATIVE BODY, MAY BE CONSIDERED AS AN "ENTERPRISE" UNDER RICO?

A reading of 18 USC 1962 quickly brings one to the conclusion that it is concerned with business associations and practices. This Court in Iannelli v. United States, 420 U.S. 770, 787 n. 19 (1975) recognized the primary purpose of 18 U.S.C. §1962 was to prevent organized crime's infiltration of business.

The Fourth Circuit herein held all public entities are "enterprises" and thereby necessarily eliminated any commercial character in the term "enterprise". (Appendix). The Fourth Circuit did not discuss the cases that have held the necessity of the entity being labeled an "enterprise" as having an economic or business purpose. (Appendix).

A very detailed discussion of the different views of the definition of the term "enterprise" is found in United States v. Anderson, 626 F. 2d 1358, 1363 (CA 8 1980), cert. denied, No. 80-766 (Feb. 23, 1981):

> "A broad construction of the term 'enterprise' became more firmly

entrenched and more expansive as more courts addressed the issue of the scope of RICO and built a body of precedent relying upon Parness and Capetto. See, e.g., United States v. Aleman, 609 F. 2d 209, 304-05 (7th Cir. 1979) cert. denied, ___ U.S. ___, 63 L. Ed 2d 780 (1980); United States v. Grzywacz, 603 F. 2d 682, 686-87 & n.6 (7th Cir. 1979); cert. denied, 48 U.S.L.W. 3733 (1980); United States v. Rone, 598 2d 564, 568 (9th Cir. 1979), cert. denied, ___ U.S. ___, 63 L. Ed 2d 780 (1980); United States v. Elliott, 571, F. 2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Swiderski, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); United States v. Brown, 555 F. 2d 407, 416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Forsythe, 560 F. 2d 1127, 1135-36 (3d Cir. 1977); United States v. Frumento, 563 F. 2d 1083, 1989-91 & n.17 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. McLaurin, 557 F. 2d 1064, 1073 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); United States v. Altese, 542 F. 2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Hawes, 529 F. 2d 472, 479-80 (5th Cir. 1976); United States v. Morris, 532 F. 2d 436, 441-42 (5th Cir. 1976) This trend toward an expansive definition has not proceeded without criticism, see e.g., United States v. Aleman, 609 F. 2d 298, 311 (7th Cir. 1979), cert. denied, ___U.S.___, 63 L. Ed. 2d 780 (1980), (Swygert, Jr., dissenting); United States v. Rone, 598 F. 2d 564, 573-74 (9th Cir. 1979), cert. denied, ___U.S.___,63 L. Ed. 2d 780 (1980) (Ely, Jr., dissenting); United States v. Grzywacz, 603 F. 2d 682, 690-91 (7th Cir. 1979), cert.

denied, 48 U.S.L.W. 3733 (1980) (Swygert, Jr., dissenting); United States v. Altese, 542 F. 2d 104, 107-110 (2d Cir. 1976) cert. denied, 429 U.S. 1039 (1977) (Van Graafeiland, J., dissenting); Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 IOWA L. REV. 837, 892-93 (1980); Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§1961-68: Broadest of the Federal Criminal Statutes, 69 J. CRIM. L & CRIMINOLOGY 1 (1978); Note, Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO, 65 U. Va. L. REV. 109 (1979); Note, Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation, 27 De PAUL L. REV. 89, 105, 112 (1977); Note, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity", 124 U. PA. L. REV. 192, 201-06 (1975), and some courts have not followed the trend toward broadly expansive interpretation, see, e.g., United States v. Sutton, 605 F. 2d 260 (6th Cir. 1979), submitted for rehearing en banc April 2, 1980; United States v. Mandel, 415 F. Supp. 997, 1020-22 (D. Md. 1976) (pretrial order, not alleged as error on appeal); United States v. Moeller, 402 F. Supp. 49, 58-61 (D. Conn. 1975) (implicitly overruled by United States v. Altese, 542 F. 2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977)).

Anderson, supra at 1372 held that for an "enterprise" to qualify under the RICO statute it must have:

> "[A]n ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence

> ... can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering'."

To find that an organization must "maintain operation directed toward an economic goal" necessarily frees all state legislative bodies and individual members thereof from prosecution under RICO. The necessary commercial character is not present.

United States v. Turkette, ___U.S. ___, (Opinion No. 80-808, decided June 17, 1981) establishes that an "enterprise" must be an entity separate and apart from the pattern of activity in which it engaged. Turkette, supra, went on to find that the entity could be legitimate or illegitimate. The case at bar will allow this Court to further define "enterprise" by either closing the Fourth Circuit's definition of no business or economic purpose (all governmental entities) or the Anderson, supra requirement that the entity have an economic or business purpose.

The impact of applying RICO to state agencies and more important, the state's legislative bodies, presents a drastic move of the federal government into a state's business. In Turkette, supra, this Court recognized that balance and it is apodictic that such infringement should be with great caution and only upon the narrowest application of enabling

statutes.

If "enterprise" includes illegal and legal entities and also includes all governmental entities it would follow that any person, persons, or entity committing two of the listed crimes would violate RICO. RICO was passed to help prevent the infiltration of organized crime into business it was not a statute to federalize the listed state criminal acts when any person, persons, or entity committed two such crimes in a ten year period. To allow the broad expansion as found herein would allow an intrusion into state actions with a constant battle between the federal and state as to who should prosecute that state's public officials.

Although "Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]", U.S. v. Turkette, supra at 10., nothing indicates that it intended it's use to usurp the privilege of an individual state's own judiciary to impose the criminal sanctions it deems most appropriate so as to deter future conduct of a simliar nature in its own legislature.

The term "enterprise" when used to describe the entity employing the defendant or with whom a defendant is associated by its common definition means something organized for commercial purposes. The plain meaning of the statute would so require. Nowhere except in the unwarranted expansion by some

lower courts has the term "enterprise" ever lost its commercial character.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 80-5102

United States of America,

Appellee,

versus

John D. Long,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia.
Charles E. Simons, Jr., Chief Judge

Argued January 9, 1981 Decided June 12, 1981

Before BUTZNER, PHILLIPS, and ERVIN, Circuit Judges

A. Camden Lewis (Barnes, Austin and Lightsey); William B. Long, Jr., Long, Black and Gaston on brief) for appellant; Lionel S. Lofton, Assistant U.S. Attorney (Thomas E. Lydon, Jr., U.S. Attorney, William G. Rhoden, Third Year Law Student on brief) for appellee.

BUTZNER, Circuit Judge:

John D. Long, a South Carolina State Senator, appeals his conviction for violating and conspiring to violate the Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. §§1962(c) and (d). Long assigns the following errors: his Senate seat, described in the indictment as an Office of Senate, was not an "enterprise" as defined by the Act; the activities of his office do not affect interstate commerce; the court improperly admitted tapes of recorded conversation; and the jury should not have been furnished transcripts of the tapes. We affirm.

I

Long and Billy Dean Roark, a Senate employee, were charged with accepting bribes, in violation of South Carolina law, paid to induce Long to procure state jobs for the persons who gave the bribes. Roark plead guilty and testified against Long.

The evidence disclosed the following undisputed facts. Roark urged an acquaintance to buy a state job from Long. This man told an agent of the Federal Bureau of Investigation about Roark's suggestion and agreed to act as an informant for the FBI. Wearing a tape recorder, the informant met several times with both Roark and Long, and he paid $700 to Long and $800 to Roark in return for Long's promise

to get him a state job. The informant then introduced Roark and Long to an FBI agent who said he was looking for state employment. The agent also had several meetings with Long and Roark, all of which were taped by a body recorder. At one of these meetings, the agent paid Long $500 as a down payment for a state job. Although both the informant and the agent obtained interviews with state agencies, including the state Alcohol Beverage Control Commission, neither was given state employment before the grand jury returned the indictments against Roark and Long.

Roark corroborated the testimony of the informant and the agent. Another witness testified that he had paid Long $1200 in return for a promise of state employment.

II

The indictment charges Long with violations of §§1962(c) and (d) of the RICO statute, which state:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indiretly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for an any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Long claims that the indictment is insufficient because the Office of Senator in the South Carolina legislature is not an "enterprise" within the meaning of RICO.

Section 1961(4) of RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The indictment charges that "[t]he Office of Senate, District Number 5, Office Number 1 [which Long held] is an 'enterprise' as defined by Title 18, United States Code, Section 1961." Long claims that the statutory definition of enterprise should not be interpreted so broadly as to encompass the political entity of a state senate seat. He contends that such an expansive definition poses a "threat of federal control and intimidation over the discretionary acts of a state senator."

The Act states that "[t]he provisions of this title [RICO] shall be liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, §904; 18 U.S.C.A. §1961 (notes). Complying with this mandate, courts of appeals considering the specific question whether public entities constitute "enterprises" have answered affirmatively, holding that such entities as a police department,[1] a state Bureau of Ciga-

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1. United States v. Grzywaca, 603 F. 2d 682 (7th Cir. 1979).

rette and Beverage Taxes,[2] and a city traffic court[3] are "enterprises" within the scope of the RICO statute.

One of the few cases holding that a public entity is not an "enterprise" is United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976). The district court in that case dismissed a RICO count that rested on the allegation that the state of Maryland was an enterprise. Long relies heavily in his brief on Mandel.

The district court's order in Mandel on the "enterprise" issue was not appealed to this court. In two recent RICO cases, however, we have indicated our disapproval of that decision. We have held, in accord with the majority of the cases, that RICO should be construed to include public entities as enterprises. See United States v. Altomare, 625 F. 2d 5 (4th Cir. 1980) (state prosecutor's office constitutes an enterprise); United States v. Baker, 617 F. 2d 1060 (4th Cir. 1980) (sheriff's department constitutes enterprise).

Long's arguments are refuted by the rationale of Baker. There we pointed out that the definition of an enterprise contained in §1961(4) did not differentiate between public and private individuals or entities. Moreover,

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2. United States v. Frumento, 563 F. 2d 1083 (3d Cir. 1977).

3. United States v. Vignola, 464 F. Supp. 1091 (E.D.Pa.), aff'd 605 F. 2d 1119 (3d Cir. 1979).

we emphasized that the congressional statement of purpose and findings in the Organized Crime Control Act, of which RICO is a part, denounces racketeering activities because, among other evils, they "subvert and corrupt our democratic process." 617 F. 2d at 1060, quoting Pub. L. No. 91-452 §1; 18 U.S.C.A. §1961 (notes). Neither the Act nor the courts' interpretation of it support the contention that its enforcement threatens the discretion state officials must exercise in the discharge of their duties. On the contrary, the definition of "racketeering activity" contained in §1961(1) pertinent to Long's case involves "bribery. . .which is chargeable under state law. . . ." It is the law of South Carolina, not federal law, that places this predicate offense beyond the pale of a senator's discretion. The Act sustains, rather than threatens, the integrity of the South Carolina Senate.

III

To establish a violation of the RICO statute, the government must show that the enterprise affects interstate commerce. As our

decision in Altomare points out, however, the government need not demonstrate that the acts of racketeering themselves directly involved interstate commerce. 625 F. 2d at 8 n. 8. Therefore, it is not necessary for the government to prove that Long's acceptance of bribes had some affect on interstate commerce. It must only show that the enterprise of a state senate office affects interstate commerce.

In Altomare, 625 F. 2d at 8, we held that the enterprise of county prosecutor had sufficient nexus with interstate commerce because:

> [t]he record reveals that interstate telephone calls regularly were placed from the prosecutor's office, that certain of the supplies and materials purchased and used by the prosecutor's office had their origins outside of West Virginia, and that persons who were not citizens or residents of the State were involved in investigations and litigation conducted by the prosecutor's office.

The government established that in fulfilling the duties of his office, Long served as a member of the Senate Finance Committee, the Banking and Insurance Committees, and the Labor, Commerce and Industry Committee. He was the

chairman of the Senate Invitations Committee. The Clerk of the South Carolina Senate testified that the Finance Committee considered the annual appropriations bill, which for 1979 consisted of approximately 1.5 billion dollars of state funds plus 1.4 billion dollars of federal funds and revenue funds derived from license and gas fees. Funds appropriated by the Finance Committee are used for operating expenses and purchases by state agencies. One such agency is the Alcohol Beverage Control Commission, which is responsible for issuing licenses for the beer, wine and liquor coming into South Carolina through interstate commerce.[4] When this cumulative evidence of interstate effect is compared to the evidence in Altomare, we think it plain that there was jurisdiction under the RICO state.

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4. In its argument that the senate office affects interstate commerce, the government notes that this ABC Commission was one of the state agencies to which Long sent the FBI informant and agent in their search for jobs.

IV

Long claims that the government failed to lay a sufficient foundation for the introduction of the taped recordings of conversations concerning the bribes. Relying on the United States v. McKeever, 169 F. Supp. 426 (S.D.N.Y., 1958) rev'd on other grounds, 271 F. 2d 669 (2d Cir. 1959)[5], Long asserts that the government failed to show there had been no changes, additions or deletions made in the tapes. Long's brief alleges:

> Yet Appellants presented a very highly accredited expert witness, one who had tested sound tape for the FBI on numerous occasions, who testified under oath, that he had no doubt but that

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5. McKeever, 169 F. Supp. at 430, held that a party seeking to introduce taped recordings establishes as a foundation the following facts:

> (1) That the recording device was capable of taking the conversation now offered in evidence.
> (2) that the operator of the device was competent to operate the device.
> (3) that the recording is authentic and correct.
> (4) That changes, addition, or deletions have not been made in the recording.
> (5) That the recording has been preserved in a manner that is shown to the court.
> (6) That the speakers are identified.
> (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

there were splices and erasures in the original tapes. At that point, Appellees presented an FBI agent who had worked with testing sound tape, who stated that any suspicious indications on the tape could be explained by other events than deliberate tampering.

In Durns v. United States, 562 F. 2d 542, 547 (8th Cir. 1977), the court explained that the foundation required for admitting tapes was designed to meet the broad goal of insuring that only competent and reliable recorded evidence adverse to the accused is allowed to go to the jury, and the decision to admit or deny evidence in any specific case must be viewed in light of this goal. The FBI agent and the FBI informant both testified that the tapes accurately represented their conversations with Roark and Long. Roark's testimony corroborated the events revealed by the tapes. Long has presented no evidence suggesting that the tapes misrepresent the conversations, even though Long would be aware of such misrepresentation, at least regarding taped conversations in which he was a participant. Furthermore, the informant, the agent, and Roark were subject to cross-examination. The government adequately proved the other requirements for the admission. We find no error in admitting the tapes, notwithstanding the testimony of Long's expert witness. See United States v. Albert, 595 F. 2d 283, 289-90 (5th Cir. 1979).

V

Finally, we find no error in the court's ruling that the jury could be furnished transcripts of the tapes while listening to the recordings. Long's counsel had been given access to the tapes and transcripts before trial, but his brief does not point out any discrepancies between them. The stenographer who prepared the transcripts was not an essential witness, because the agent responsible for their preparation testified to their accuracy. United States v. Rochan, 563 F. 2d 1246, 1252 (5th Cir. 1977). The district court properly instructed the jury that if they detected any discrepancy between the transcripts and the tapes, they were to consider as evidence only what they heard on the tapes. The use of typed transcripts as aids to the jury in listening to the tapes is a matter within the sound discretion of the trial judge. United States v. West, 574 F. 2d 1131, 1138 (4th Cir. 1978); United States v. Hall, 342 F. 2d 849, 853 (4th Cir. 1965). The record contains no suggestion that this discretion was abused.

AFFIRMED.

AFFIDAVIT OF SERVICE

In accordance with Tules of the Supreme Court of the United States, I hereby certify that I have this 10th day of August, 1981 mailed the required copies of this Petition for Writ of Certiorari in the Clerk's Office of the Supreme Court of the United States and further certify that I have mailed this 10th day of August, 1981 three copies to Lionel Lofton, Assistant U. S. Attorney, 1100 Laurel Street, Columbia, SC 29201.

BY: Barbara E. Grove

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August 10, 1981

Sworn to before this 10th day of August, 1981.